

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NEWPARK MALL LLC,

Plaintiff,

v.

CRGE NEWPARK MALL, LLC, et al.,

Defendants.

Case No. 15-cv-0817-PJH

**ORDER GRANTING MOTION FOR
DEFAULT JUDGMENT IN PART AND
DENYING IT IN PART**

This is a case alleging breach of a lease agreement and guaranty – specifically, failure to meet certain construction obligations set forth in the lease agreement.

Plaintiff NewPark Mall, LP ("NewPark"), is a Delaware limited partnership and the owner of the NewPark Mall located in Newark, California. The partners in the NewPark limited partnership are alleged to be "Delaware entities." Defendants are an Arizona limited liability company and a Delaware limited liability company – CRGE NewPark Mall LLC ("CRGE" – the Arizona LLC) and Boomtown LLC ("Boomtown" – the Delaware LLC, located in Arizona).

NewPark alleges that Boomtown was established for the sole purpose of developing a chain of restaurants doing business as "Toby Keith's I Love This Bar and Grill," and that between September and December 2013, Boomtown, "through five different single-purpose entities – all restaurants doing business as Toby Keith's I Love This Bar and Grill ("the Toby Keith tenants") – entered into leases for five different properties owned by Rouse Properties, Inc." Cplt ¶¶ 12-16.

In one of these transactions, NewPark and CRGE entered into a lease for property

1 at the NewPark Mall in September 2013, and Boomtown provided a guaranty. NewPark
2 alleges that it fulfilled its obligations under the lease (delivering the leased premises and
3 paying CRGE \$791,600 in tenant improvements), and that CRGE has not met its
4 obligations (the construction of the tenant improvements).

5 NewPark filed the complaint in this action on February 23, 2015, seeking to
6 terminate CRGE's lease and recover the payments made for tenant improvements which
7 CRGE has failed to use for legitimate construction costs at the leased premises. Plaintiff
8 asserts five causes of action – breach of contract (against CRGE), unjust enrichment
9 (against CRGE and Boomtown), breach of guaranty (against Boomtown), breach of the
10 duty of good faith and fair dealing (against CRGE and Boomtown), and money had and
11 received (against CRGE and Boomtown).

12 On March 3, 2015, NewPark filed proofs of service, showing service of the
13 summons and complaint on both defendants on February 26, 2015. On April 3, 2015,
14 NewPark requested entry of default as to both defendants, asserting that they had been
15 served but had not responded to the complaint. The clerk entered default on April 7,
16 2015, and on April 21, 2015, NewPark filed a motion for default judgment as to both
17 defendants. On April 29, 2015, defendants filed a motion to set aside the default,
18 claiming that they had a meritorious defense, that they did not engage in culpable
19 conduct, and that NewPark would not be prejudiced if the default were set aside.

20 On May 28, 2015, the court granted the motion to set aside the default on the
21 condition that defendants file an answer or other responsive pleading by June 4, 2015.
22 Each defendant did file an essentially identical answer and affirmative defenses on June
23 4, 2014. On June 9, 2015, the court denied the motion for default judgment.

24 At the initial case management conference (“CMC”) on July 2, 2015, the discovery
25 cutoff date was set for November 27, 2015; the dispositive motions hearing deadline was
26 set for January 27, 2016; the pretrial conference date was set for April 28, 2016; and the
27 trial was set for May 23, 2016.

28 On October 19, 2015, NewPark filed a motion to compel production of documents,

1 asserting that defendants had completely ignored its document requests. On October 26,
2 2015, Brent Phillips, a sole practitioner who was counsel for defendants CRGE and
3 Boomtown, filed a motion to withdraw as counsel. He stated that defendants had not
4 fulfilled their contractual obligations to compensate him for fees and costs he has
5 incurred in this action, despite repeatedly promising to do so, and that as a result,
6 continuing to represent defendants would impose an unreasonable financial burden on
7 him because the fees and costs incurred as of that date were substantial.

8 Mr. Phillips also asserted that defendants had ceased all communications with
9 him. He contended that he had written and called defendants at least 12 times
10 requesting documents and other materials to respond to NewPark's discovery requests
11 and to comply with defendants' Rule 26 disclosure requirements, and that defendants
12 had responded to none of his calls. He asserted that defendants' failure to communicate
13 with him had made it impossible for him to comply with discovery requests and prepare
14 the defense.

15 On October 29, 2015, the parties submitted a joint discovery letter attesting to
16 counsel's attempts to meet and confer with regard to the discovery motion. The
17 Magistrate Judge set a telephonic discovery hearing for November 5, 2015, and,
18 following that hearing, ordered defendants to produce all responsive documents by
19 November 12, 2015, and directed that if defendants failed to do so, plaintiff should file a
20 motion for terminating sanctions.

21 On November 20, 2015, the court granted Mr. Phillips' motion to withdraw as
22 counsel for defendants, conditional on his agreement to accept service of documents and
23 to forward them to defendants – which as LLCs cannot appear except through a licensed
24 attorney – until new counsel was substituted in or defendants' default was entered. The
25 court also set a further CMC for December 17, 2015, directing that defendants would be
26 required to appear through counsel.

27 On December 4, 2015, NewPark filed the present motion to strike defendants'
28 answers and to enter default judgment in the amount of \$16,172,914.87, based on

defendants' failure to provide any discovery responses.

On December 17, 2015, the court held the further CMC. Defendants did not appear. NewPark stated that defendants had still not responded to the document requests. Defendants' opposition to the present motion was due on December 18, 2015, but none was filed.

DISCUSSION

A. Legal Standard

The court may sanction a party that fails to obey a discovery order by striking pleadings, staying further proceedings pending compliance, or terminating the action by default of dismissal. See Fed. R. Civ. P. 37(b)(2)(A)(iii)-(iv).

Since dismissal and default are such drastic remedies, they may be ordered only in extreme circumstances – i.e., where there is willful disobedience or bad faith. See In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996). “A terminating sanction, whether default judgment against a defendant or dismissal of a plaintiff’s action, is very severe.” Conn. Gen’l Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007). “Only ‘willfulness, bad faith, and fault’ justify terminating sanctions.” Id. (quoting Jorgensen v. Cassiday, 320 F.3d 906, 912 (9th Cir. 2003)).

All that is required to show willfulness or bad faith is “disobedient conduct not shown to be outside the control of the litigant.” Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993). An explicit finding of “willful” noncompliance is necessary. It will not be inferred from findings that the noncompliance was “unexcused” or “unjustified.” Schwarzer, et al., Fed. Civ. Proc. Before Trial (2015 ed.) § 11:2421.

Once the court finds that discovery violations are “due to willfulness, bad faith, or fault of the party,” it weighs the following five factors in determining whether to impose terminating sanctions: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions (including whether the court has considered lesser

sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions). See Hester v. Vision Airlines, Inc., 687 F.3d 1162, 1169-70 (9th Cir. 2012).

The first two factors generally favor terminating sanctions for violations of discovery orders, while the fourth cuts against such sanctions. Thus, the outcome usually depends on the third and fifth factors. See Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004). Another important factor is whether the court previously warned the party that terminating sanctions were in the offing if it did not comply with the discovery order, and some courts require such a judicial warning. See U.S. ex rel. Wiltec Guam Inc. v. Kahaluu Const. Co, Inc., 857 F.2d 600, 605 (9th Cir. 1988).

B. Plaintiff's Motion

In the motion, NewPark argues that terminating sanctions are warranted under Rule 37(b)(2) and the court's inherent power, and seeks a default judgment in the total amount of \$16,172,914.87.

Here, while a default was entered against defendants in April 2015 for failure to respond to the complaint, the court granted defendants' request in May 2015 to set aside the default, conditional on their filing a response to the complaint, which they did. While a default ordinarily will not be entered where the defendant has responded to the complaint, Rule 37 specifically provides that a court may sanction a party that fails to obey a discovery order by striking pleadings, staying further proceedings pending compliance, or terminating the action by default of dismissal. See Fed. R. Civ. P. 37(b)(2)(A)(iii)-(iv). That is, even though a defendant has appeared in the action, the court has the power to strike the defendant's answer and render a default judgment as the ultimate sanction for refusal to obey discovery orders. See Dreith v. Nu Image Inc., 648 F.3d 779, 786 (9th Cir. 2011).

Here, NewPark argues that defendants' discovery violations are clearly due to willfulness and bad faith, as it is "disobedient conduct not shown to be outside the control

of" defendants. Thus, NewPark asserts, the court should weigh the five factors listed above, and should find that terminating sanctions are warranted.

NewPark asserts that defendants' complete failure to abide by their discovery obligations and to proceed with an orderly resolution of this case satisfies the five-factor test for terminating sanctions. NewPark contends that under the circumstances, it is clear that any less drastic sanctions would be ignored, and would only serve to further delay the expeditious resolution of this litigation, prejudicing NewPark and its ability to pursue the judgment it is entitled to and disrupting the court's efforts to manage its docket. NewPark also notes that MEJ warned defendants that if they failed to comply with the discovery order, the court would invite NewPark to file a motion for terminating sanctions.

NewPark seeks entry of default judgment in the amount of \$16,172,914.87, as follows:

- \$791,600 in Tenant Allowance ("TA") payments that were made to Defendants but clearly not used for the purposes intended;
- \$103,153.08 in liens that have been filed against the property based on defendants' failure to pay contractors and subcontractors;
- \$791,720.00 in costs associated with construction necessary to put the subject premises in a condition to be marketed for re-leasing;
- \$658,067.80 in rental payments due and owing under the contract;
- \$13,741,971.33 in future rental payments due and owing under the contract;
- \$86,002.66 in attorneys' fees incurred by plaintiff in this matter and in the unlawful detainer and lien foreclosure actions filed in State Court; and,
- \$400 in court costs.

NewPark has supported its request for the \$16,172,914.87 judgment with two affidavits – one by Jason Kislin, a partner at Greenberg Traurig, LLP, counsel for NewPark in this action; and one by Christina Molinaro, the General Manager at NewPark.

1 Mr. Kislin states in his declaration that Greenberg Traurig was hired as "national
2 coordinating counsel to over see the multiple cases filed by certain single purpose
3 entities owned by Rouse Properties, Inc., against Boomtown Entertainment, LLC, and its
4 related CGRG single-purpose entities." He claims that these cases all arise from
5 breaches of various lease and guaranty agreements by Boomtown and the CRGE
6 entities. Kislin Decl. ¶ 1.

7 Mr. Kislin states further that with regard to NewPark, defendants' failure to live up
8 to their obligations under the lease has necessitated the filing of the present action, and
9 an unlawful detainer action (against the same defendants), and has also involved
10 NewPark in a series of construction lien foreclosure actions filed by the contractors and
11 subcontractors that worked on the project at NewPark Mall. Mr. Kislin has attached time
12 sheets that he claims reflect the attorneys' fees and costs incurred by Rouse Properties
13 in prosecuting this action and "the related state court proceedings."

14 The total fees and costs claimed are \$86,002.66 (per Mr. Kislin). Broken down,
15 that comes to \$81,747.22 in fees and \$4,255.44 in costs. However, as noted above,
16 NewPark's motion states that it is seeking \$86,002.66 in "attorneys' fees," plus \$400 in
17 "court costs" (presumably the filing fee, though NewPark does not specify).

18 Ms. Molinaro states that pursuant to the lease between CRGE and NewPark,
19 CRGE was responsible for completing construction of the space, and NewPark was
20 required to pay Tenant Allowance (or "TA") money to CRGE. She attaches
21 documentation (Exh. 1) that she claims shows deposit of the first two TA payments into a
22 Boomtown bank account. The payments were for \$395,800 each (or a total of \$791,600).
23 In addition, she attaches documentation (Exh. 2) of \$103,153.08 in construction liens that
24 were filed against the property by various subcontractors who have not been paid for
25 their work.

26 Finally, Ms. Molinaro asserts that NewPark has not yet secured another tenant for
27 the space. She claims that it will take \$791,720 to put the premises in shape to rent to
28 another tenant. She bases this on \$40 per square foot, which she says is on the low end

1 of the \$100/sq. foot it "could" cost to make the space leasable to some tenants.

2 She also attaches a spreadsheet (Exh. 3) that she claims details the amount of
3 rent due through November 30, 2015 – \$658,067.80. In addition, she claims that the
4 amount of rent due from December 1, 2015, through the expiration of the lease (which
5 she states is February 28, 2015, but which the spreadsheet (Exh. 3) shows as February
6 28, 2029) is \$13,741,971.33.

7 The court finds that terminating sanctions are warranted, and GRANTS the motion
8 for default judgment on that basis. However, as the court explained to counsel at the
9 hearing on the motion, NewPark has not sufficiently proved up its damages – at least as
10 to the total amount it is seeking.

11 First, with regard to the entitlement to the default judgment, willfulness and bad
12 faith have been established. Defendants have provided no responses to NewPark's
13 discovery requests, despite having been ordered to do so by the court, and they have
14 made no showing that their failure to comply was for reasons outside their control.
15 Indeed, they did not file any response to the present motion, and according to the
16 declaration of their former counsel filed in support of his request to withdraw as counsel,
17 they did not even provide him with the necessary documents or information so that he
18 could prepare any responses.

19 As for the five factors, with regard to the first factor, the public interest in
20 expeditious resolution of cases would be best served by striking defendants' answers and
21 entering a default. Defendants are no longer represented by counsel, and as LLCs, they
22 cannot represent themselves. There is no indication in the record that they have made
23 any effort to obtain counsel since the motion to withdraw was granted. In addition, the
24 complaint was filed in February 2015, and the discovery cut-off and dispositive motions
25 hearing deadlines have passed.

26 With regard to the second factor, the court's interest in managing its docket would
27 be best served by striking defendants' answers and entering the default. Defendants'
28 behavior has necessitated the filing, briefing, and hearing on a motion to withdraw as

1 counsel, a motion to compel production of documents, and the present motion for default
2 judgment. In addition, the court has conducted two case management conferences. The
3 case is more than 10 months old, and essentially nothing has happened to move it
4 forward – not even a motion to dismiss for failure to state a claim. The need to devote
5 time and energy to work on these motions and hearings has interfered with the court's
6 ability to fairly manage its docket so as to benefit all litigants with cases pending on that
7 docket.

8 With regard to the third factor, it is true that defendants will be prejudiced if a
9 default judgment is entered against them – and that this factor weighs against the
10 imposition of sanctions – but given that defendants are responsible for the violation of the
11 court's discovery order, any prejudice can be viewed only as self-inflicted.

12 With regard to the fourth factor, the public policy favoring disposition of cases on
13 their merits also weighs against the imposition of sanctions, but again, NewPark has
14 done everything within its power to obtain a resolution on the merits, while defendants
15 have done everything possible to ensure that the merits of the case are never reached.

16 With regard to the fifth factor, the court previously explicitly advised defendants
17 that failure to comply with discovery well might result in the filing of a motion for default
18 judgment. The court did not previously impose less drastic sanctions, but under the
19 circumstances, there do not appear to be any less drastic sanctions available.

20 Defendants did not respond to the discovery requests; they were ordered to do so, but
21 still failed to respond; the discovery cutoff date has passed; and defendants provided no
22 good cause for their failure to comply with the discovery requests and have not even
23 made any effort to respond to the arguments made by NewPark in this motion.

24 Thus, the first two factors strongly favor terminating sanctions, the third and fourth
25 factors slightly weigh against terminating sanctions, and the fifth factor favors terminating
26 sanctions.

27 Once the court has determined that entry of a default judgment is warranted, it
28 must determine the appropriate remedy. See Geddes v. United Fin. Grp., 559 F.2d 557,

560 (9th Cir. 1977). "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). Further, a plaintiff seeking default judgment must "prove up" the amount of damages it is claiming. Philip Morris USA, Inc. v. Castworld Prods., Inc., 219 F.R.D. 494, 501 (C.D. Cal. 2003). This is where Newport's motion falls somewhat short.

The complaint seeks recovery of the \$791,600.00 in TI payments that NewPark paid to CRGE, pursuant to the lease agreement. Cplt ¶¶ 17, 23, 26. That is the only specific amount of damages pled in the complaint. The prayer for relief also seeks a judicial declaration that CRGE is in breach of the lease, that Boomtown is in breach of the guaranty, and that the lease is terminated; "damages to be determined at trial;" and an award of "legal fees and costs of suit" to NewPark. NewPark has established that it paid the \$791,600.00, and that CRGE has failed to complete the work on the project so that it could meet the mandatory "Opening Date" (opening of the restaurant), a requirement of the lease. See Cplt ¶¶ 38-40. Thus, the \$791,600.00 can be awarded in damages.

Apart from the \$791,600.00 in TI payments, NewPark seeks recovery of the amount it paid to discharge certain mechanics liens against the property. The lease provides that "Landlord" (NewPark) can recover money paid to discharge mechanics liens (here, \$103,153.00) plus "interest" and "all costs and expenses, including reasonable attorneys' fees incurred by Landlord" and that that amount "shall be due and payable by Tenant to Landlord as additional rental" Lease, Art. 14. NewPark has established that the amount of the mechanics liens was \$103,153.00, and the court finds that that amount can be awarded in damages for breach of contract.¹

As for the \$791,720.00 that NewPark seeks for "costs associated with construction necessary to put the subject premises in a condition to be marketed for re-leasing,"

¹ The court notes, however, that while the complaint makes reference to possible mechanics liens filed against the property, it does not specify any particular amount owing or identify all the subcontractors involved. That information appears only in Exh. 2 to the Molinaro Declaration.

1 NewPark does not cite any provision of the lease or guaranty that would entitle it to
2 damages for this additional construction, and there is nothing pled in the complaint to
3 support this request, apart from vague references to NewPark having completed
4 "Landlord Work" prior to turning over the premises to CRGE. See Cplt ¶¶ 8, 24.
5 However, there is no allegation that NewPark is seeking to recover the amount it has
6 actually spent (not specified) as part of its damages.

7 NewPark now argues in its motion that as a condition of the lease, and prior to
8 turning over the premises to CRGE, it "completed demolition and construction work on
9 what was fully leasable space in the amount of \$704,685" and that as a result of
10 defendants' failure to comply with the terms of the lease and their "abandonment of the
11 property in a complete state of disrepair," it will be "forced to incur additional construction
12 costs to put the property back into a position to be re-leased." In support, NewPark cites
13 the Molinaro Declaration at ¶ 7. However, apart from this statement in the declaration,
14 there is no evidence that NewPark spent that amount, and no citation to the lease
15 agreement supporting its attempt to recovery the amount it claims (per Ms. Molinaro) will
16 be necessary to put the premises back into position to be re-leased (\$791,720.00). As
17 NewPark has not established its entitlement to this amount, this part of the claimed
18 damages is not recoverable.

19 With regard to the attorneys' fees and costs, there are several problems. Per Mr.
20 Kislin, NewPark is seeking \$81,747.22 in attorneys' fees and \$4,255.44 in costs (a total
21 of \$86,002.66). However, as noted above, NewPark's motion states that it is seeking
22 \$86,002.66 in "attorneys' fees," plus \$400 in "court costs" (presumably the filing fee,
23 though NewPark does not specify). Thus, NewPark appears to have added the litigation
24 costs to the attorney's fees, and is referring to the entire amount as "attorney's fees."

25 It is not entirely clear that all of NewPark's claimed fees are recoverable in this
26 case – in particular, the fees that Mr. Kislin refers to as having been incurred in a state
27 court action. Apart for the fees for work performed in connection with discharge of
28 mechanics liens (contemplated in lease agreement as indicated above), the court cannot

1 locate any basis for recovery of the remaining fees. If there is a provision in the lease
2 supporting an award of fees for all the work performed in this case (apart from work on
3 discharge of mechanics liens), NewPark should have pointed it out to the court.²

4 As for the \$4,255.44 in costs, NewPark is evidently attempting to recover all its
5 litigation expenses, including costs that it would not be able to recover as a prevailing
6 party under 28 U.S.C. § 1924 and Civil Local Rule 54. Most of these costs are not
7 allowable, and the request for costs needs to be resubmitted to the clerk in accordance
8 with the Civil Local Rules, after judgment is entered.

9 As for the amount NewPark is seeking to recover for past and future rent, the
10 discussion in the Molinaro Declaration is somewhat vague. It may be that the amounts
11 claimed are accurate, but as the court explained to counsel at the hearing, the basis of
12 NewPark's calculation of the past and especially the future rental payments is unclear.

13 The lease recites amounts due for "minimum annual rent," see Lease, Reference
14 Provision 1.07; and Lease, Art. 4; and for "Operating Expenses," Reference Provision
15 1.22. The "spreadsheet" attached as Exh. 3 to the Molinaro Declaration shows amounts
16 for "future rent" that appear to match up with the amounts shown in Reference Provision
17 1.07 for "minimum annual rent." Ms. Molinaro states that, per the lease (no citation to
18 specific provision), NewPark has applied a discount to future rental payments, but the
19 amounts claimed appear to match up with the amounts shown in Reference Provision
20 1.07, with no evidence of any discount.

21 As the court explained at the hearing, given that \$14+ million (i.e., the bulk) of the
22 total amount NewPark is trying to recover consists of those past and future rental
23 payments, NewPark needed to do a better job of explaining the calculations – particularly
24 considering that NewPark will presumably be renting out the space to a new tenant and
25

26 ² Furthermore, Mr. Kislim's references to "Rouse" prosecuting the action are unclear, as
27 Rouse Properties, Inc. is not a party in this action, and the only reference to "Rouse" in
28 the complaint is a statement that Rouse Properties is the "owner" of the five locations
where defendants were allegedly constructing Toby Keith restaurants.

1 thus any recovery of "future rent" could be viewed as double recovery. At the hearing,
2 the court therefore directed counsel to file a supplemental declaration addressing these
3 deficiencies, no later than 30 days from the date of the hearing – or by February 12,
4 2016.

5 No supplemental declaration was filed by that deadline. On the off-chance that
6 one would still be forthcoming, the court waited two additional weeks before issuing this
7 order. It appears, however, that NewPark has nothing to add to its original briefing, as no
8 declaration has been filed. Upon reflection and further review of the papers, the court
9 finds that NewPark has adequately established a basis for recovery of past-due rent only.

10 Accordingly, the court GRANTS the motion, but NewPark's recovery will be limited
11 as follows: NewPark shall recover from defendants \$791,000.00 in Tenant Allowance
12 ("TA") payments; \$103,153.00 in money paid to discharge mechanics liens; \$658,067.80
13 in past-due rent through December 1, 2015; and \$81,747.42 in attorney's fees, for a total
14 recovery of \$1,633,968.22. NewPark may submit a cost bill to the clerk for whatever
15 allowable costs it is seeking.

16 CONCLUSION

17 In accordance with the foregoing, plaintiff NewPark's motion to strike defendants'
18 answer and for default judgment is GRANTED, and NewPark shall recover from
19 defendants the sum of \$1,633,968.22.

20
21 **IT IS SO ORDERED.**

22 Dated: February 25, 2016



23
24 PHYLLIS J. HAMILTON
United States District Judge